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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 75-65

INGLEWOOD RESIDENTS' PROTECTIVE ASSOCIATION, et al.

Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

GREENWALD AND BAIM
6300 Wilshire Boulevard
Suite 1200
Los Angeles, CA 90048

213/653-3970

Counsel for Petitioner

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CITY OF LOS ANGELES, a municipal corporation,

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Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Petitioner, Inglewood Residents Protective Association (IRPA), prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeal (Second Appellate District) of the State of California rendered in this proceeding on January 15, 1975 which became final on April 16, 1975.

Opinions Below.

The California Supreme Court denied a Petition for hearing on April 16, 1975. This denial is unreported and is set forth in Appendix C attached hereto. The (second) opinion (upholding the trial court judgment) of the Court of Appeal is also unreported and is attached as Appendix B. The (first) opinion (reversing the trial court judgment) of the Court of Appeal is reported in 6 ERC 1235. The trial court judgment of August 15, 1972, (granting dismissal by summary judgment on the pleadings) is not reported and is attached as Appendix A.

Jurisdiction.

This Petition for Certiorari is filed less than 90 days from April 16, 1975, the date hearing was denied by the California Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

The trial court's summary judgment on the pleadings, in the case at bar, dismisses the "class action" of the association Petitioner (that has standing to maintain the action) against the respondent City, operator of the Los Angeles International Airport (LAX). The class action seeks monetary and nonmonetary relief, in the form of injuction, declaratory relief and damages for nuisance, trespass, negligence, assault and breach of contract and just compensation for inverse condemnation and constitutional damaging, from noise emanating from the airport. The class action was dismissed on the basis that claims under these theories require individual treatment, hence class action is not available as a matter of law. The questions thereby arising are:

1. Is the denial of class action treatment in the case at bar a denial of due process and equal protection of the law?
2. Should the doctrine of Griggs v. Allegheny, (1962) 369 U.S. 84, be reviewed in light of developments subsequent to 1962?
3. Is Constitutional "Just Compensation" denied when"group redress"is denied for "group wrongs"?
4. Does the City of Los Angeles have extrajurisdictional power or liability because of its appropriation of private airspace over the City of Inglewood?

Constitutional and Statutory Provisions Involved.

The Constitution of the United States Preamble provides: "...to insure domestic tranquility...."

The U.S. Constitutuion, Art. 1, Sec. 8 provides: "Congress shall have the power to regulate commerce among the several States."

The U.S. Constitution, Fourteenth Amendment, provides: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

The Federal Aviation Act of 1958, 49 USC 1301 et seq. FAR 91.79 thereunder provides: except when necessary for takeoff or landing, no person may operate an aircraft over congested areas below an altitude of 1000 feet over the highest obstacle.

Federal Aid for Public Airport Development Act, 49 USC 1101, FAR, §§151.21, 151.25 and 151.26 thereunder provides, in part: that to obtain Federal aid, the airport must submit a request on Form FAA 1623 and must state in its application:

"...all of the property interest that he holds in the lands to be developed or used as part of, or in connection with, the airport as it will be when the project is completed. Each project application contains a covenant on the part of the sponsor to acquire, before starting construction work, or within a reasonable time if not needed for the construction, property interests satisfactory to the Administrator in all the lands in which it does not hold those property interests at the time it submits the application...."

"Each sponsor must submit with his application a written statement specifying what consideration has been given to the interest of all communities in or near which the project is located. This statement must contain the substance of any objection to, or approval of, the proposed project made known to the sponsor by any local individual, group or community."

National Environmental Policy Act 42 USC 4321 et seq. Noise Control Act of 1972, 42 USC 4901 et seq.

Statement of Case.

The case at bar was instituted in 1969 shortly after the City of Los Angeles (Respondent) opened a new (LAX) runway for general use. The Association (Petitioner) alleges it was constructed under a contractual commitment by the City of Los Angeles, that the runway could be used for limited purposes only (emergency landing). It was constructed with funds from Federal grants which were conditioned on sufficient airspace acquisition by the City of Los Angeles. It was constructed after commitment from its aircraft operator lessees of $300,000,000 for expansion and acquisition of air easements. The Association, a duly incorporated California nonprofit corporation, expressly franchised with powers to pursue the instant action for Inglewood residents and homeowners, in its class action, seeks redress for homeowners and residents of the City of Inglewood. Inglewood abutts Los Angeles. The LAX Airport is constructed in close proximity to the Inglewood/Los Angeles border. The Airport runways and facilities are so positioned to cause aircraft using the Airport to fly directly over the congested heavily populated Inglewood residential areas emitting noise levels which cause personal injury to members of the class and interfere with the use and enjoyment by the class members of their residences, schools, hospitals, churches and public buildings and facilities and rendering them useless for their purposes depriving the class members of life, liberty, equality and property.

The complaint alleges, in each count, that:

"The United States Constitutuion Preamble recites as one of the purposes for which the Constitution is promulgated '...to insure domestic tranquility...'" Further, it alleges that:

"(a) The Commerce Clause of the Constitution of the United States must be interpreted to promote, not defeat, this stated purpose:

"(b) The Fifth, Ninth and Fourteenth Amendments to the Constition of the United States must

be interpreted to promote, notdefeat this purpose. ....joinder of all members is impractical and the failure of this Court to permit a class action in this instance will provide to the defendants herein an immunity to the causes of action as herein stated and thus deprive the plaintiff and members of the class represented by the plaintiff of due process of law in violation of the Fourteenth Amendment ot the U.S. Constitution which provides, in essence that no State shall deprive any citizen of the United States of life, liberty or property without due process of law... ....Interpretations of Federal or State or City law, statutes, ordinances, rules or regulations in contravention of the Preamble of the United States Constitution and Article I, Section 1 of the Constitution of the State of California, an interpretation of the laws of the United States, State of California, City of Los Angeles, or City of Inglewood which give priority to the right to recover for damage to property over the right to recover for damage to persons is unconstitutional and unenforceable to the extent that such interpretations of said laws, statutes, ordinances, rules or regulations by the State judiciary deprive citizens of the United States of life, liberty or property without due process of law and to the extent that such judicial action denies such citizens equal protections of the laws of the United States. ...At all times mentioned herein, California Government Code, §§815, 830, 50470 and 50474(i); Code of Civil Procedures, §§367, 369, 373.5, 382, 389, 431, 731(a) and (b), 1060, 1061, 1238, 1248(a) and 3482; Los Angeles City Charter, Article XXIV, §238, et seq.; California Constitution, Article I, §14; Civil Code §§1001, 3482; Public Utilities Code §21002; FAA Regulations 24 (12, 434(a)); FAA Act of 1958, §601(a), 603, 604 and 605; State Aeronautics Act, Division 9, §§21402 and 21403... Defendants are applying said statutes, ordinances, City Charter and Constitutional provisions, and FAA Regulations to plaintiff's detriment." [Quoted from complaint]

The trial judge granted summary judgment on the pleadings dismissing the Association's effort for

class action redress for the following reasons: DECLARATORY RELIEF--Insufficient as a class action; DECLARATORY RELIEF AS TO SUBCLASS--Improper for judicial relief; INVERSE CONDMENATION-"The remedy does not lend itself to general award for community damage or to cure some ill caused to a group by a broad damaging or taking;" NUISANCE-"No reason to consider seriously the allowance of class action relief or damage allegedly suffered by way of property loss or personal injuries;" TRESPASS--"The relief is not available to class action;" UNCONSTITUTIONAL DAMAGING--"Other relief is available;" BREACH OF CONTRACT--"This remedy is not available for class treatment;" ASSAULT--"The remedy for assault to persons in this manner is not available for class treatment;" NEGLIGENCE--"Remedy for negligence is not available for class action;" INJUNCTION--"If injuctive relief is available, it can be obtained through individual plaintiffs."

On review, the Appellate Court, (in its first decision) reversed the trial court, holding that: the trial court's judgment is appealable, the Association has standing to maintain this action; the action is proper for class action treatment in that common questions of law and fact are sufficiently pervasive to permit class action and the maintenance of a class action would be advantageous to the judicial process and the courts and the class is sufficiently ascertainable. In so ruling, the Appellate Court held that plaintiff's pleadings satisfied the requirement for class action treatment under California law--class action entitlement are set forth in California Civ. Proc. Code, §382. The requirements under California law for class action treatment are twofold: that there be a well defined community of interest and an ascertainable class.

Thereafter, the California Supreme Court granted hearing on application of the City of Los Angeles. Pending hearing, the California Supreme Court issued its decision in City of San Jose v.

Superior Court, 12 Cal 3d 447, 115 Cal Rptr. 797, holding that because land is unique--class action is not available for inverse condmenation or nuisance actions. Without oral argument on the hearing theretofore granted in the case at bar, the Supreme Court remanded the matter to the Appellate Court for determination in accord with its San Jose decision.

On rehearing, the Appellate Court, following the direction of the California Supreme Court, amended its prior decision, holding that "if inverse condemnation and nuisance require individual treatment so do each of the other claims:-in light of the decision in San Jose, we hold that the Association cannot maintain this suit as a class action." Petitioners' petition to the Supreme Court of the State of California, on appeal from the Second Appellate District's decision, and its petition for oral argument on the hearing theretofore granted by the Supreme Court of the State of California, were denied.

PRIOR RAISING OF FEDERAL QUESTIONS.

Federal questions raised by the underlying pleadings was necessary to determination of the motion for summary judgment on the pleadings and such judgment could not have been given without deciding it. The applicability of the U.S. Constitutional provisions have been raised at each stage of this litigation: Trial Court, Court of Appeals and Supreme Court of California. The questions were raised as follows:

A. Los Angeles County Superior Court (Trial Court). The issue was raised in each count of the cause of action for class action redress. The court disposed of this issue in its judgment sustaining summary judgment on the pleadings as to each count (Appendix A).
B. California Court of Appeals, Second Appellate District. In a brief filed before the

Second Appellate District, dated December 23, 1974, Petitioner herein referred the court to Constitutional, Civil, property, contractual and environmental rights, pleaded in the pleadings as issue and further, to the governmental rights and limitations (perview of police power, immunity and eminent domain), the rights and limitations resulting from Federal funding and Federal regulation, and the unconstitutional taking and damaging appropriatedly raised by the pleadings. The decision disposing of said issue is disposed of by the Appellate Court's decision (Appendix B).

C. California Supreme Court. Petition for hearing, dated February 20, 1975. For disposition, see Appendix C.

REASONS FOR GRANTING THE WRIT.

I. THE DENIAL OF CLASS ACTION TREATMENT IN THE CASE AT BAR--A GROUP WRONG CIRCUMSTANCE--IS A DENIAL OF CONSTITUTIONAL AND CIVIL RIGHTS AND A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the case at bar, class action treatment was denied the Association while at the same time the trial judge permitted the individuals named in the complaint to go forward on an individual basis on the causes of action alleged. The Trial Court's decision, although reversed prior to the San Jose, supra, decision and affirmed after the San Jose decision, assumed a new proportion by reason of the application of the San Jose decision. By reason thereof, the present state of California law denies class action treatment on airport noise actions even though such actions may appropriately qualify for class action treatment in all other respects under California law.

"Class actions," are not such a rare beast as some think; its analogies are so taken for granted,

though, that the relationship is often overlooked. (See NRR:14:C 1-6.) Bills of Peace, Qui Tam, and Quia Timet remedies did not evoke the alarm with which courts approach the so-called "new" class action device.

Corporations are a recognized ongoing device by which a group of persons can sue and be sued through a representative. Criminal prosecutions, and all government litigation in the name of "The King," or "The People" are another ongoing mechanism by which a class--all citizens, or the government officials--may litigate through a representative. Suits in admiralty wherein a ship is libeled are class actions against all who hold interests in the ship. Similarly, any in rem action is a class action. In any property action, our very concept of "property ownership" means that an action against the present owner binds all in privity who take by or through him--the present owner represents all future owners. (Similarly, our custom of vesting title in an individual rather than a family allows that individual to represent at law what otherwise might be sociologically termed "family property.")

When the members of a class are united in a corporation or a governmental unit, there is an authorized procedure for choosing the officials who may litigate and bind the collectivity. We think of the litigation as being carried on by the organization, not by its members, and do not give them notice, chance to opt out, or chance to control the litigation. See, however, Eisen v. Carlise, 48 L.W. 4804. In property actions, we think of the individual present owner in fee simple as the only owner, and do not think of giving litigation rights to other present family members or to representatives of the future owners. In admiralty libels and other in rem actions, there is an attempt to give notice and litigation rights to the individual claimants of the res, but if it is not possible to do so the litigation may go forward.

The City of Los Angeles appears in the case at bar in a representative capacity. It has immense economic capacity because of its representative capacity. Not only does it represent the people of Los Angeles, but also the Los Angeles Airport Department which in turn, represents the interest of its lessees and concessionairs. The Association, IRPA, is a State franchised, duly qualified representative, authorized under California Corporate Law to pursue rights here in issue, for Inglewood residents and owners.

In a Research Contribution of the American Bar Foundation (Foster, "Status of Class Action Litigation", 1974, No. 4), the author observed that:

> "...when certification is denied because of manageability, the result is a failure of justice to the extent that no other adequate remedies are available...class representation is the only conceivably adequate remedy for a group wrong." And: "The class action is, like other remedial devices, nominally neutral with respect to substantive law. But, like all remedial tools, it can have profound effect on a wide variety of essentially substantive relationships. Where, for example, a representative proceeding is the only remedy to be had, its availability makes the whole difference between protection or nonprotection of substantive interests. Again, for enterprises which had long operated on the expectation that only a small fraction of would-be claimants would ever press their claims, a more efficient remedy for enforcing individual claims could have vastly unsettling effects without any change whatever in the underlying substantive law which applied to the individual relationships between the parties." And: "Yet in the largest sense, what the controversy is all about is precisely the kind of matter which traditionally has triggered the exercise of equity jurisdiction: the search for relief when remedies at law are inadequate--in this instance, remedies for group

> wrongs which have immemorially lain beyond the reach of effective redress either because individual action got at only a scant fraction of the problem or because the costs of investigation and suit far outweighed the return to the individuals who might have pursued them."

What matters most in equity courts is the practical fairness of the results of its rulings in light of all the circumstances of the case. The complexity of the circumstances involved in the issues of law and fact raised by the pleading in the case at bar, in light of today's needs, make it virtually impossible to properly reach a just result without evaluating the "Group Wrong." This evaluation can be accomplished by class action treatment.

In the San Jose case, supra (decided 4 to 3), Justice Tobriner writing the dissent states:

> "...In a one-sided presentation, the majority opinion notes the individual issues which divide the proposed class, but pays little heed to the more significant common issues of law and fact which unite the class; observes the burden of class litigation but overlooks the far greater burden of individual suits; claims to protect the rights of class members to claim damages, but takes from them the most effective means of enforcing that right... The majority opinion speaks of protecting the right of class members to damages, but destroys what may be the only efficient means of redress. The cost and inconvenience of individual litigation may very well dissuade many members of the class from instituting individual suits, and the result of the present decision will then be that such members will recover no damages for loss of market value nor for any other harm. The majority's assertion that subclassification in the present case is incompatible with the maxim that each parcel of land is unique is both historically and logically unsound. This venerable maxim for which centuries

has served the useful, but limited purpose of permitting equitable suits for specific performance of land sale contracts, has nothing to do with class actions. Uniqueness means only that each parcel of land differs in some particular from every other parcel, just as each person differs in some way from every other person. A valid classification, or subclassification, however, does not require that all members of the class possess identical characteristics; it requires only the existence of "issues common to the class as a whole sufficient in importance so that their adjudication on a class basis will benefit both the litigants and the court"... indeed, this Court and others have often entertained actions brought on behalf of a class composed of the owners of interest in real property (see e.g. Chance v. Superior Court, 58 Cal.2d 275, 23 Cal. Rptr. 761, 373 P.2d 849; Bauman v. Inslay Investments, 30 Cal. App. 3d 752, 106 Cal. Rptr. 889; Foster v. City of Detroit (6th Cir. 1968), 405 F.2d 138 and Biechele v. Norwalk & Western Ry. Co. (N.D.Ohio 1969), 309 F. Supp. 354... The majority's reasoning is also legally meritless, for it assumes that each diverse issue compels the creation of a separate subclass, an assumption which conflicts with the principal that class litigation requires only that common issues predominate over diverse issues. What the majority opinion overlooks are the manifest benefits arising from the use of a class action to resolve the controversy concerning noise and vibration damage to property in the vicinity of the San Jose Municipal Airport..."

Class actions and class representative actions are not strangers to the judicial process on the airlines, air pilots and airport defense side. (Burbank v. Lockheed, 411 U.S. 624; Air Transport Assn. v. Crotti, 389 F. Supp 53, (1975); American Airlines v. Hempstead, 272 F. Supp 266, 398 F2 369; Airline Pilots Assn. v. D.O.T., 1 Avi 18, 251. In unity there is strength. The most

effective means of protecting a right--is the right to unite. Our forefathers were guided by the principle that "he who devides us will rule us." Access to the courts by the class composed of The Air Transport Association, virtually all U.S. scheduled air carriers, or the class composed of virtually all U.S. Certified Airline Pilots, has been neither prohibited or questioned by the courts in the many judicial proceedings in which they have been permitted to participate. IRPA, the Association in the case at bar, has equally important rights to protect and is equally entitled to access to the courts.

II. -- THE DOCTRINE OF GRIGGS v. ALLEGHENY, DEFINING THE CRITERIA FOR THE TAKING OF AN AIR EASEMENT OVER PRIVATE PROPERTY FOR WHICH PAYMENT OF JUST COMPENSATION MUST BE MADE AS REQUIRED BY THE FOURTEENTH AMENDMENT, SHOULD BE REVIEWED IN LIGHT OF DEVELOPMENTS SUBSEQUENT TO 1962.

In Griggs v. Allegheny, 369 U.S. 84 (1962), this Court decided that: "an adequate approach way is as necessary a part of an airport as is the ground the airstrip itself is constructed.... Without the "approach areas," an airport is indeed, not operable. Respondent, in designing it had to acquire some private property. Our conclusion is that by Constitutional standards, it did not acquire enough." As this Court had previously stated, in U.S. v. Causby, 328 U.S. 256 (1946): "Navigable airspace is that space which does not destroy the beneficial use of the land and does not interfere with the use and enjoyment of the land." Rendering the property unuseable for its purpose in the Constitutional sense constitutes a taking of an air easement for which compensation must be paid. Navigable airspace is the airspace in the public domain--the airspace above the minimum safe altitudes of flight prescribed. Navigable airspace is that airspace whose use by aircraft will not interfere with the use and enjoyment of the property below rendering it unuseable for the purposes intended. Airspace below "Navi-

gable airspace" is private property (see Greenwald/ Branch, "AIRSPACE JURISDICTION" VI Natural Resources Lawyer 3, pp 299-337). Federal regulation prohibits and restricts flight in private airspace and restricts use of Federal funds without ownership of easements necessary for flights in the private airspace. Other judicial decisions have established that Los Angeles operations at LAX invades private Inglewood airspace and a compensable "taking" of Inglewood owners and residents' private property and rights has occurred. Aaron v. City of Los Angeles, (40 Cal App 3d 471, 115 CR 162, 3 ERC 1779 --cert. denied U.S. Sup. Ct., 419 U.S. 1122), Parker v. City of Los Angeles, (118 CR 687). After expensive and protracted litigation in both Aaron and Parker, the trial courts awarded redress to "individuals" for the taking. Los Angeles v. Japan Airlines, 13 Avi. 17, 279, the California Appellate Court notes that in 1967 the airlines agreed to fund $300,000,000. in bonds for further expansion of LAX and the necessity for acquisition of "airspace or air easements or similar interest in land." No action has been instituted by the City of Los Angeles. To acquire the private airspace, it has appropriated over Inglewood or to settle its continuing nuisance, trespass and assault to the homeowners and residents from such use. The case at bar institutes an action for redress in connection with the funds expressly appropriated for that purpose. That such an action is appropriate in the State of California is exemplified by City of Oakland v. Nutter, 13 Cal App. 752 92 CR 347 in which the City brought an action as condemnor to acquire an air easement in the airspace above described real property for airport approaches.

Although Constitutional guarantees provide citizens the right to relief under inverse condemnation, it should not necessarily by the exclusive theory on which an individual party must proceed. The congress of the United States added new section 611 to the Federal Aviation Act; in November, 1969, with the objective of expressly limiting aircraft noise (Public Law 90--411),

Congress also expressed its legislative intent in the language of the National Environmental Policy Act (42 U.S.C. §4321 et seq.) and in the Federal Noise Control Act of 1972 (42 U.S.C. §4901 et seq.). A new age of environmental awareness exists. The limited right of redress articulated by the Griggs case no longer satisfies recognized societal needs.

III. CONSTITUTIONAL "JUST COMPENSATION" IS DENIED WHEN GROUP REDRESS IS UNAVAILABLE FOR GROUP WRONGS.

In the case at bar, the threshold issue which must be proved by those seeking inverse condemnation is: "Does the noise invasion constitute a taking?" In evaluating the noise invasion, the standard that is applied is the doctrine of the "common man."

The evidence required to establish the taking of an avigation servitude and the measure of "substantial impairment of enjoyment and use of the property" is founded not on the impairment experienced by persons of high or unusual sensitivity, but rather by the standards of the common man. (Jackson Municipal Airport Authority v. Wright, Miss. 1970, 232 So. 2d 709; Westhaven v. Eastern Airlines, Inc., D.C. Conn. 1971, 331 Fed Supp. 16 Supplmented 333 Fed Supp. 338 affirmed 470 F 2d 148 certiorari denied, 411 U.S. 965; Luedtke v. Milwaukee County, D.C. Wis., 1974 371 F.Supp. 1040; Shipp v. Louisville and Jefferson County Air Bd., Ky. 1968, 431 S.W. 2d 864 certiorari denied, 393 U.S. 1088.)

In Ferguson v. City of Keene, (11 Avi. 1824), the court held: "The difficult questions which have arisen from attempts to define the requisite elements of the 'taking' bear witness to the unsuitability of dealing with problems of airplane noise by enforcing Constitutionally based claims." While the taking provisions do not undertake to socialize all losses, they do require compensation for taking of property. It is the determination of the issue "has there been a taking" which forms

the line between that which is compensable and that which is noncompnesable. In noise cases, this line is drawn in accordance with the sensibilities of the common man. In Virginians for Dulles v. Volpe, (4ERC 1232 1972) plaintiffs sought, by class action, to enjoin violation of the Fifth Amendment resulting from noise from aircraft operations at the Washington National Airport. Originally, the complaint contained a request for damages which was withdrawn before trial. The judge characterized the case as "basically a private nuisance action in which specific injury must be shown." At the outset, the court stripped the case of its class action character by holding that enough named plaintiffs remained to enable the court to decide the issues presented and render an effective judgment. At the trial's conclusion, however, the court held in part that failure of the named plaintiffs to prove that all persons and properties in the airport area suffered general injury, preclude Fifth and Ninth Amendment claims for injunctive relief, and further, that noise from aircraft operations at airports whose continued use is necessary for public transportation and convenience does not constitute common law nuisance.

The test of liability for nuisance is the effect of the alleged annoyance on persons of ordinary sensibilities, Carter v. Johnson, 209 Cal App. 2d 589, 26 CR 279. Noise which merely offends a hypersensitive person is not a nuisance for which judicial recovery is permitted. To be considered a nuisance, the activity must constitute a substantial interference to a reasonable person, the same test as applied to the "taking" issue in connection with interference by noise with the use and enjoyment of real property. In most jurisdictions, great weight is given to the courts' conception of the interest of the community at large. For example, if a city's prosperity depends on continuation of the enterprise, public policy requires that its noise making activity may

not be enjoined. Therefore, in an action to enjoin transportation noise, the court weighs the individual detriment (interference suffered by the complainant) against the public benefits derived by the community at large (effect on the economy, transportation, etc.).

In Seagraves v. Portland City Temple (13 Avi. 17, 254) decided by the Oregon Supreme Court on May 31, 1974, the court stated: "The cases are legion in which the extent of the interference with reasonable use and enjoyment attributable to noise has been established by the evidence of witnesses describing the character and effect of the noise. To establish this element of nuisance, all that need be established is that the annoyances regarded as harmful to the health or comfort of ordinary people. This can be done by a descriptive account of the manner in which the noise unreasonably interferes with the usual course of living by ordinary people. We hold that the evidence was sufficient to establish the substantiality of defendants' interference with plaintiffs' use of their property." It is to be noted that the language in the Seagraves action for establishing the existence or nonexistence of a "nuisance" is the same language which would be applicable for establishing the existence or nonexistence of a "taking".

In Aitkensen v. Bernard, Inc., 223 Oreg. 624, 355 P 2d 229, the court in applying the "trespass" theory required a showing that "the flights must be at such a height as not to interfere unreasonably with the enjoyment of the surface by the person in possession." It is axiomatic that the Constitutional right to "just compensation in an airport noise action is founded upon the same prerequisite proof to establish the 'taking' 'nuisance' or 'trespass' although the type of relief and defenses in connection with each may vary."

IV. THE CITY OF LOS ANGELES DOES NOT HAVE EXTRA-JURISDICTIONAL POWER OVER INGLEWOOD AIRSPACE.

In the Griggs case, supra, the majority of the

court found that the respondent, which was the promoter, owner and lessor of the airport, was the one who took the air easement in the Constitutional sense. The court noted that Congress provided in 49 U.S.C., §1109 for the payment to owners of airports whose plans were approved by the administrator of a share of "the allowable project costs" including the "costs of acquiring land or interest therein or easements through or other interests in airspace" §1112 (a), (2). It went on to state: "A country that designed and constructed a bridge would not have a useable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?"

In view of the clear mandate of the Griggs case, supra, that the airport is required under Constitutional standards to acquire air easements, and the $300,000,000 in funding provided in 1967 for this express purpose (City of Los Angeles v. Japan Airlines, supra) the class action mechanism became not only appropriate, but mandatory if the responsibility of the City of Los Angeles was to be justly administered and discharged. The action Anderson v. Souza, 38 Cal 2d 825 243 P 2d 497, was instituted by owners of real property located near a private airport to enjoin the operation of the airport on the ground that it was a nuisance and to recover damages therefore. Because it was a private airport, the court distinguished it from a public (municipal) airport on the ground of its inability to condemn property for its use. The court stated: "The owners and operators of such an airport notwithstanding that they are engaged in a legitimate business, the encouragement and furtherance of which is a publicly--declared policy of our legislature... must nevertheless conduct it with due regard for the rights of others, and if because of location the operation of such a business will result in depriving others of their

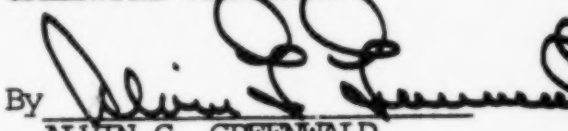
property rights, it cannot be permitted, for to do so would in practical effect condemn the property of others in violation of Constitutional guarantees." ...An airport is not a nuisance per se, but that it may become a nuisance either because of unsuitable location or a proper operation or both, has been clearly decided. In the case at bar, the City of Los Angeles, although licensed to conduct its airport, is without the power of eminent domain and without police power in the airspace of Inglewood residents and property owners. The dilemma created by this unusual circumstance of taking without authority so to do and the conduct of a nuisance, trespass assault and the commission of a breach of the contractual obligation to pay for the air easements taken, creates a unique circumstance that should be the subject of judicial determination by utilization of the mechanism best suited to the problem--the class action.

CONCLUSION.

It is respectfully submitted that for the reasons stated a writ should issue to review the decision of the California Court of Appeals.

DATED: July 9, 1975. Respectfully submitted,

GREENWALD AND BARM

By 
ALVIN G. GREENWALD

APPENDIX

F I L E D
AUG 15 1972
William G. Sharp
County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

INGLEWOOD RESIDENTS', etc., Plaintiffs, vs. CITY OF LOS ANGELES, et al., Defendants.	No. 646,875 MEMORANDUM RULING: RECONSIDERATION OF ACTION TAKEN ON THIRD AMENDED COMPLAINT

This memorandum is intended as a guide through the complexity of the pleading under consideration, the extensive proceedings already had in this case, and the corrections in these proceedings now made necessary.

This action began January 27, 1969 with the filing of the original complaint on behalf of a large number of individuals and Inglewood Residents' Protective Association, hereinafter "the Association." Relief was sought on account of the operation by the defendant City of Los Angeles of its International Airport, and particularly its recently opened north runway.

By the spring of 1972 the defendant City had secured orders terminating the action as to numerous plaintiffs, including the Association, who did not claim to be owners of real property, and sustaining demurrers to all counts other than 2, 11 and 15 of the third amended complaint as amended and supplemented.

Some of these rulings are now seen to be erroneous in the light of the opinion of the California Supreme Court in Nestle vs. City of Santa

Monica, 6 c. 3d 920, filed April 28, 1972.

After Nestle counsel herein were invited to join with the court in a review of the entire case, testing the rulings heretofore made against the Nestle opinion. Plaintiffs' counsel have indicated an intention to stand on the third amended complaint as amended and supplemented (hereinafter "the complaint"), and by oral motion have requested its reinstatement in its entirety including reinstatement of the parties heretofore barred as plaintiffs. Defendant City urges that previous rulings stand except as they are necessarily and currently modified by Nestle, and further moves for judgment on the pleadings in favor of the City upon the first ten causes of action. By this motion the City would have the court deny class representation in respect to the claims of the plaintiffs.

QUESTIONS PRESENTED

The following must now be determined:

1. Whether any relief sought has been improperly denied to all plaintiffs, or any group of plaintiffs.

2. Whether any relief available to plaintiffs may be enforced by class action, embracing parties not named as plaintiffs herein; and

3. Whether any former plaintiffs should be restored to their former status as such.

RULING

I have reached the following conclusions:

1. Previous rulings have improperly denied relief upon causes of action based upon nuisance (count 12), trespass to property, (count 14); assualt resulting in personal injuries, (count 16); and negligence resulting in personal injuries, (count 17). For reasons set forth later, I am also allowing

the case to proceed for certain injunctive relief, (count 18).

2. The ruling dismissing the Association from the action was proper.

3. None of the relief available to any plaintiff may be the subject of class action.

4. The individual plaintiffs heretofore dismissed from this case because they did not reveal ownership of real property interest ought to be reinstated as parties, and permitted to establish any rights they have under the causes of action remaining in the complaint. The order of June 29, 1971 is set aside so that this may be accomplished.

5. All other rulings remain.

NATURE OF THE PLEADING

The complaint contains nineteen causes of action stated on behalf of these three categories of plaintiffs.

a. The Association, which describes itself as a non-profit corporation formed to take certain actions for its members and the residents and property owners of the City of Inglewood. (p.5). Othern than references to "plaintiffs" having properties or property interests which have been damaged, there seems to be no contention that the Association owns any property or interest therein in the affected territory in its own right.

b. "Homeowners" are alleged to be plaintiffs who own real property in Inglewood. (p.2).

c. "Residents" are alleged to be plaintiffs who have a "possessory interest" in real property in Inglewood. (p.2)

Both homeowners and residents are named in the caption of the original, first amended, second amended and third amended complaints, references being made thereto. Such individuals who may not

be sui juris appear by a guardian ad litem.

The complaint contains extensive allegations designed to establish the Association, its chief executive officer (Mr. Berardi) and president (Mr. Patterson) as well as unnamed officers and directors of the Association as representatives of a class consisting of other property owners and residents of Inglewood who may be unnamed in this suit. (ps. 6&7). The class would apparently embrace 94,000 residents/homeowners interested in 30,000 parcels of real property (p.6).

The structure of the complaint is this: Of its nineteen causes of action, numbers ten through eighteen are attempts to state grounds for relief for individual grievances under differing theories. Numbers one through nine attempt to state the same grounds for relief each for an alleged class, and by way of class action relief. Thus, the counts may be paired as one and ten, two and eleven, etc. The nineteenth cause of action would have the court declare by its judgment whether a class exists as to which class relief is available. (Paragraph 127, p. 62a).

CLASS ACTION IS NOT AVAILABLE

Before embarking upon the required count by count analysis it must be recognized that class treatment may not be afforded simply because it appears to be an attractive means of attempting to cure a community's environmental problems and annoyances. It appears most commonly used to redress ill treatment due to fraud or contract breach; (Darr vs. Yellow Cab Co., 67 Cal. 2d 695; Vasquez vs. Superior Court, 4 Cal. 3d 800; Collins vs. Rocha, 7 Cal. 3d 232; Witkin, "California Procedure" 2d Ed. p. 1860) and is most readily employed in cases where the damage to each individual is minimal: one purpose of class treatment being discouragement of malefactors who otherwise could escape giving redress. Class actions are not suitable for personal injury actions (Diamond vs. General Motors Corp.,

20 C.A. 2d 374) or where individual claims are substantial enough to justify separate actions or require individual proof of some issue (Diamond, supra, p. 380; Slakey Brothers, etc., vs. Parker, 265 C.A. 2d 204; Los Angeles Fire, etc., vs. Rodgers, 7 C.A. 3d 419.) Of course, the party claiming to represent the class must belong thereto; this rule prevents the Association from attempting such representation (Greater Westchester Homeowner's Association, Inc., vs. City of Los Angeles, 13 C.A. 3d 523.) Restraint as to such usage is understandable; the courts are reluctant to appoint legal counsel for persons not even in court; and seem to recognize that persons with substantial claims in their own right may be expected to take action on their own behalf, joining with other persons injured by consolidation of cases if necessary. (Slakey, supra; p. 210, Daar, supra; p. 715.)

In reconsidering the previous rulings, the availability of class action will be considered separately as to each form of relief sought.

DEMURRERS RECONSIDERED

Declaratory Relief Designed to Show Acts Unconstitutional Count 10 (p.47) and Count 1 (p.5)

These counts would have a declaration of the rights of plaintiffs under numerous California laws and federal requirements. (See prayer pages 62b through 67.) These counts do not state facts sufficient to constitute causes of action in the individual plaintiffs; a fortiori, they do not so state as to any class. The previous rulings sustaining demurrers to these counts without leave to amend must stand.

Furthermore, relief under other causes of action is now available to the individual plaintiffs, making unnecessary any resort to declaratory judgment; (General of America Insurance Co., vs. Lilly, 258 C.A. 2d 465 at 471.)

Declaratory Relief as to Class Delineation
Count 19 (p. 61)

This court seems to seek a delineation by judgment, first as to whether there is a class of persons who may properly be represented as a class on account of the City's actions and, second, the area and identity of such class. The general demurrer was previously sustained without leave; this ruling will stand.

Inverse Condemnation
Count 11 (p. 52) Count 2 (p. 18)

Demurrer to Count 11 has heretofore been overruled; as for Count 2 which purports to set forth claims on behalf of a class for inverse condemnation, the only demurrer filed by the City appears to be the general one to the entire complaint (Paragraph XIX, p. 4 demurrer to third amended complaint) which was overruled. It is doubtful that such demurrer can serve to attack this count, (Witkin; "California Procedure" 2d Ed. p. 2416.) Therefore, Count 2 is at this moment an existing cause of action to which answer has been filed. The City challenges the availability of class action for inverse condemnation by its motion for judgment on the pleadings which I treat as a general demurrer. It is clear to me that class action does not lie. Inverse condemnation is that remedy by which persons deprived of their property or rights therein, usually but not always by government action, may be compensated for their specific property loss. The remedy does not lend itself to securing a general award for community damage, or to cure some ill cuased to a group by a broad damaging or taking. In inverse condemnation each party wronged is required to prove the nature and extent of any wrong to specific property or property rights. While it may be that each property has been "taken" to some txtent by the easement here complained of, the nature of the taking must differ not only as to each parcel but as to

each flight of plane or directional use of the runway. Furthermore, plaintiffs do not seek trivial awards; the complaint alleges each parcel and each possessory interest therefore have been damaged at $15,000 (p. 22 & 56). The motion to dismiss Count 2 is granted.

Nuisance
Count 12 (p. 56) Count 3 (p. 22)

These counts allege the maintenance by the City of a nuisance within the meaning of California Civil Code Section 3479 and seek abatement of the nuisance by injunction as well as $15,000 per parcel of property and $15,000 for each plaintiff, presumably for personal damages suffered by plaintiffs (p. 68.) Nestle clearly holds that actions for nuisance lie against cities for damages caused thereby. I see nothing in Nestle allowing injunction proceedings restraining a city operating an airport serving interstate commerce. The opinion states the action is to recover for property and personal injury damages (p. 924.) There are at least two good reasons for denying such restraint. Plaintiffs now have adequate remedies at law (Triangle Ranch, Inc. vs. Union Oil Company, 135 C.A. 2d 428, 438; Witkin; "California Procedure" 2d Ed. p. 1508;) and injunctive restraint would not be in the public interest (Loma Portal Civic Club vs. American Airlines, Inc., 61 C 2d 582, 590; Witkin, supra, p. 1511.) Therefore, guided by Nestle, the order sustaining demurrer to Count 12 is set aside so far as it seeks remedy for individual plaintiffs in damages for the claimed nuisance. The ground of demurrer to these causes of action is the general one of failure to state sufficient facts to constitute a cause of action for nuisance. The demurrer seems not to attach the relief by way of injunction sought in these counts. Therefore, Count 12 will be restored, but unless otherwise persuaded I do not intend to grant relief under

Count 12 of an injunctive nature.

I see no reason to consider seriously the allowance of class action relief for the damage allegedly suffered by way of property loss or personal injuries. The property damage is alleged to be so substantial as to justify individual action by each wronged property owner; I do not believe the theory of class action should be extended to embrace personal injury claimants who may be damaged in the manner indicated. The ruling sustaining the demurrer to Count 3 shall stand.

Unconstitutional Damaging Without Compensation
Count 13 (p. 59) Count (p. 26)

These counts appear to seek damages at the rate of $15,000 for each parcel of property and $15,000 for each individual plaintiff on the theory that although the City had illegally appropriated property rights and subjected persons in Inglewood to annoyances, no appropriate remedy lies therefor under eminent domain (inverse condemnation) or otherwise. It appearing that counts enabling plaintiffs to recover under several legal theories will remain after this order, the previous ruling sustaining demurrers to these counts without leave shall stand.

Trespass
Count 14 (p. 59) Count 5 (p. 28)

These counts appear to seek damages on account of trespass upon each parcel of property represented by plaintiffs' ownership or possessory interest, in the same substantial measure. If Nestle shall permit recovery of damages for negligence and nuisance, no reason occurs to me why damages may not be awarded for trespass by use of air easement by a city. Noise and vibration may constitute trespass if intentionally inflicted and due to negligence, recklessness or even extra-hazardous activities (Gallin vs. Poulou, 140 C.A. 2d 638; McNeill vs. Redington, 67 C.A. 2d 315;

Smith vs. Lockheed, 247 C.A. 2d 774 at 784.) The allegations of these necessary elements will withstand scrutiny under a general demurrer. The ruling, therefore, sustaining demurrer to Count 14 is set aside and that demurrer overruled. The ruling sustaining the demurrer to Count 5 shall stand; the relief not being available to class action. (See comment on Count 12.)

Breach of Contract
Count 15 (p. 59) Count 6 (p. 28)

Demurrer to Count 15 was heretofore overruled; that ruling will stand. The demurrer to Count 6 was sustained; that ruling shall stand, it not appearing that this remedy is available to class action. (See comment to Count 12.)

Assualt
Count 16 (p. 60) Count 17 (p. 31)

These counts state the infliction of an assualt upon individuals occurring on each aircraft flight. I do not detect any claim for property damage. Nestle, permitting actions for negligence and nuisance, would certainly appear to permit actions for personal assualt. As against a general demurrer sufficient intent is pleaded in the allegation of commission of unlawful acts (Lopez vs. Surchia, 112 C.A. 2d 314, 318.) Therefore, the sustaining of the demurrer to Count 16 is set aside and that demurrer is overruled. The sustaining of the demurrer to Count 7 shall stand; the remedy for assualt to persons in this manner is not available to class actions.

Personal Injuries - Negligence
Count 17 (p. 60) Count 8 (p. 33)

The remarks made as to 16 and 7 apply here, the sustaining of the demurrer to Count 17 is set aside and that demurrer overruled. The sustaining of the demurrer to Count 8 shall stand.

Injunction
Count 18 (p. 60) Count 9 (p. 37)

Here the plaintiffs would have the court compel the City to adopt and enforce a number of procedures designed to alleviate the nuisance of airport operations by threat of terminating the City's operations of International Airport by injunction. As stated under discussion of Counts 12 and 3, which charge maintenance of a nuisance, I seriously doubt the availability of injunctive relief here, but question whether denial is proper at the pleading level and upon general demurrer. Therefore, the order sustaining demurrer to Count 18 is set aside and that demurrer overruled. The sustaining of demurrer to Count 9 shall stand; if any such relief is available it can be obtained through the individual plaintiffs.

RESTORATION OF PLAINTIFFS HERETORE DISMISSED

This action has been terminated as to two types of plaintiffs; the Association and plaintiffs who did not return interrogatories disclosing ownership of real property. The summary judgment in favor of the City and against the Association appears to be proper and that judgment is being filed concurrently herewith. All individual persons who have been dismissed from the case should be afforded additional opportunity to reveal by appropriate answer to interrogatories the extent to which their possessory rights in real property or personal rights may have been injured or damaged by the causes of action restored to the complaint.

Minute Order accomplishing the foregoing is being entered. The action will now proceed as to Counts 11, 12, 14, 15, 16, 17 and 18. The City shall have twenty days from this date to supplement its answer heretofore filed or file an amended answer. If the court's aid is needed in framing additional interrogatories to plaintiffs, counsel will please apply. DATED: 8/15/72

/s/ Stevens Pargo, Judge

APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

INGLEWOOD RESIDENTS' PROTECTIVE ASSOCIATION, etc., et al., Plaintiffs and Appellants, vs. CITY OF LOS ANGELES, Defendant and Respondent.	)	CIV. NO. 41894 (Superior Ct. No. 946,875)
	)	COURT OF APPEAL- SECOND DISTRICT FILED JAN 15 1975 CLAY ROBBINS, JR. CLERK

APPEAL from judgment of the Superior Court, Los Angeles County. Stevens Fargo, Judge. Affirmed.

Greenwald, Landrum & Baim, and Jack A. Hendler, for Plaintiffs and Appellants.

Burt Pines, City Attorney, Milton N. Sherman, Chief Assistant City Attorney, James H. Pearson and Ronald J. Einboden, Deputy City Attorneys, for Defendant and Respondent.

On January 24, 1974, we filed our opinion herein reversing a summary judgment granted by the trial court. The effect of that judgment was to dismiss appellant Inglewood Residents' Protective Association, a nonprofit corporation, from the action. The Supreme Court thereafter granted a hearing and subsequently retransferred the appeal to us for reconsideration in light of its decision in City of San Jose v. Superior Court, 12 Cal. 3d 447, decided September 6, 1974.

On reconsideration, we adhere to and readopt

with minor amendment the portions of our former opinion which set forth the procedural history leading to this appeal, and which deal with appealability and the standing of the Association. In light of the decision in San Jose, we hold that Association cannot maintain this suit as a class action.

We, therefore, affirm the summary judgment dismissing Association, since its only role in this litigation is as a class action plaintiff.

Procedural History

The procedural history of this action is long and convoluted, although the record on which this appeal is brought is limited in scope[1] and the issues raised are comparatively narrow. Association and numerous individuals who live in the City of Inglewood filed the original complaint in 1969, seeking damages and injunctive and declaratory relief for injuries allegedly sustained because of the operation by Los Angeles of Los Angeles International Airport. This complaint eventually was succeeded by a third amended complaint.[2] The third amended complaint contains nineteen so-called causes of action. Ten of

[1] The clerk's transcript did not contain the order appealed from nor many of the other relevant proceedings or matters below. Accordingly, pursuant to rule 12(2) and on our own motion we have augmented the record by examining the file of the superior court in the matter.

[2] The trial court's memorandum indicates that the third amended complaint has been amended and supplemented. The issues raised here do not involve any amendments or supplements to the pleadings, and the parties make no reference to them. We have not examined the amendments or supplements.

these seek to assert grounds for relief on a class basis.

Association pleads in some detail that one of the purposes and objects of its corporate existence is to act for its members and for the residents and property owners of the City of Inglewood in matters concerning their social welfare, health, safety and well-being. It alleges that its has been authorized by a corporate resolution to maintain the action to protect its members. It further alleges that its chief executive officer and president are themselves homeowners and residents of Inglewood and that they and the Association sue as representatives of all property owners and residents in Inglewood (asserted to be approximately 94,000 persons). Numerous other allegations are made as to the size and identity of the class, the existence of common questions of law and fact, and the nature of the common as well as the individual relief which is sought.

On August 16, 1971, Los Angeles filed a notice of motion for an order dismissing Association's "complaint, as amended," (the reference must be to the third amended complaint which had been filed almost a year previously) and for the entry of judgment in favor of the city. This motion was made on the ground that plaintiff had no property interest of its own in the City of Inglewood. The motion was supported by a declaration of a deputy city attorney referring to the fact that in its answers to interrogatories Association had failed to identify any property owned by it in the City of Inglewood. On November 1, 1971 the trial court entered its minute order granting "defendant's motion" previously submitted. Nunc pro tunc, the court clarified the minute order on November 4, 1971 by specifically referring to the motion which had been granted as "Defendant's motion for order dismissing the Complaint [Third Amended] as amended as to [Association]. . . .

In the same minute orders the court denied without prejudice to later renewal motions which plaintiffs had previously made for reconsideration of orders sustaining demurrers.3/ Appellant promptly filed a notice of appeal from the November 1, 1971 minute order, but never pursued the appeal.4/

On July 11, 1972 Los Angeles filed a notice of motion for judgment on the pleadings. This motion was directed to the first ten causes of action of the third amended complaint -- the causes which purport to seek class action relief. Although the file does not reflect any formal proceedings in court, there must have been informal discussions between counsel, because Los Angeles' memorandum of points and authorities comments that the city's demurrer had already been sustained to all of these causes of action except the second but that since plaintiffs were going to move the court to reconsider some of its previously made

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3/ Neither this motion nor the demurrers are discussed in the briefs.

4/ The order was not one from which an appeal could be taken. If regarded as a dismissal, a formal order was required. (Code Civ. Proc., §581d; Palazzi v. Air Cargo Terminals, Inc., 244 Cal. App. 2d 190, 192.) If regarded as a summary judgment, the summary judgment itself and not the order for it is the appealable matter. (Integral Land Corp. v. Anderson, 62 Cal. App. 2d 770, 771.) Los Angeles never submitted a summary judgment, advising the court by letter that it had not done so because the court had indicated by letter to the parties that after decision of Nestle v. City of Santa Monica, 6 Cal. 3d 920, then pending in the Supreme Court, but later decided April 28, 1972, the trial court would welcome motions for reconsideration.

rulings the motions for judgment on the pleadings was directed to all of the class action counts.

On July 28, 1972, a hearing was held on the motion for judgment on the pleadings and on plaintiff's motion for reconsideration. The latter motion does not appear in the record. The matters were submitted for decision and on August 15, 1972, the court filed a memorandum ruling, a minute order in conformity with the memorandum which, so far as concerns this appeal, made various rulings as to demurrers and dismissed the second cause of action, and a summary judgment. The latter dismissed Association's complaint. This appeal followed.

Appealability

It will be remembered that the notice of appeal states that the appeal is "from the Memorandum Ruling and Order" made on August 15, 1972. While the memorandum ruling is not itself an order, and while the minute order and the summary judgment are not in the record as originally prepared (see, fn. 1, supra), it is clear to us that the appeal is from the summary judgment which was entered against appellant. Neither of the two motions which Los Angeles directed against Association was entitled as a motion for summary judgment. Nevertheless, in its memorandum the trial court stated that "summary judgment in favor of the City and against the Association appears to be proper." Los Angeles refers, in its brief, to its motion for an order dismissing the complaint, filed August 16, 1971 as a motion for summary judgment, and to the court's action of August 15, 1972 as having granted that motion. It is clear that a summary judgment entered pursuant to section 437c of the Code of Civil Procedure "is an appealable judgment as in other cases." (Code Civ. Proc. §437c.) Therefore, construing the notice of appeal to refer to the summary judgment, the appeal lies.

Standing of Association

The trial court stated in its memorandum ruling that its previous minute order dismissing the complaint as to Association was proper. That order was based on a showing that Association had no property interest of its own and therefore could not represent the class in question. The authorities there relied upon by Los Angeles were Los Angeles Fire & Police, etc., League v. Rodgers, 7 Cal. App. 3d 419, and Greater Westchester Homeowners Assn., Inc. v. City of Los Angeles, 13 Cal. App. 3d 523. Since the decision of the trial court in this matter of the case of Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, has been decided. It involved exactly the same issue and procedure as was followed here: a summary judgment against an incorporated plaintiff which owned no property in the area affected. Residents held that the plaintiff there had standing to sue for a class, since the allegations of its complaint established that the members of the corporation lived in the affected area and suffered injury from the matters complained about. (34 Cal. App. 3d at p. 121.) Here, Association has clearly alleged that the operation of Los Angeles International Airport injures its members and residents and property owners in the City of Inglewood. The complaint is even more explicit in showing injury than was the pleading involved in Residents of Beverly Glen, supra. That case is dispositive of the issue here presented. We hold that Association does have standing to maintain this action.

Propriety of Class Action

The gravamen of the action below presents the question of injury to various parcels of land in the City of Inglewood, and to individuals residing in that city, because of the operation of an airport. The complaint alleges the existence of many common questions of fact and law, while at the same time it is recognized that issues

individual to specific class members are also presented. " . . . [T]he determination of the question whether a class action is appropriate will depend upon whether the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits. . . ." (Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 810.) "The ultimate question in every case of this type is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. . . ." (Collins v. Rocha, 7 Cal. 3d 232, 238.)

Los Angeles argues that there is no ascertainable class here, because there is a constant movement of people in and out of the City of Inglewood. Los Angeles "...apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class...." (Darr v. Yellow Cab Co., (1967) 67 Cal. 2d 695, 706.) The argument is therefore, not well taken.

Los Angeles also argues that damages will have to be individually ascertained for each of the class members, and that jointly triable issues are not numerous or substantial enough to justify class treatment.

In City of San Jose v. Superior Court, supra, 12 Cal. 3d 447, the action was filed on behalf of all real property owners situated in the flight pattern of the San Jose Municipal Airport. Pro-

ceeding on theories of inverse condemnation and nuisance, recovery was sought for diminution in the market value of the property caused by aircraft noise, vapor, dust and vibration.

We agree with respondent that, for the reasons stated by the Supreme Court in San Jose (see, especially, 12 Cal. 3d at pp. 460-463) this action may not be maintained on a class basis. It is unnecessary to restate those reasons here. We are bound by the higher court's decision.

The issues in the instant case include claims of inverse condemnation and nuisance, as in San Jose, and as well diverse other claims at least equally clearly requiring individual treatment if nuisance and inverse condemnation so require.

We note that there are numerous individual plaintiffs below and that the complaint asserts, on their behalf, causes of action in many respects paralleling those sought to be asserted by the Association. Nothing in this opinion is to be taken as intimating any decision on our part as to the merits or demerits of those causes of action. We express no views thereon.

The judgment dismissing the Association as a party plaintiff is affirmed.

NOT FOR PUBLICATION

We concur: COLE, J.*

FILES, P.J.

KINGSLEY, J.

---

* John L. Cole, Judge of the Superior Court of Los Angeles County, assigned by the Chairman of the Judicial Council.

A P P E N D I X

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APR 16 1975

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HEARING DENIED

In re: 2 Civ. *No.* 41894

Inglewood Residents' Protective Assoc., et al.

vs.

City of Los Angeles

Respectfully,

G. E. BISHEL
Clerk

APPENDIX C

SUPREME COURT, U.S.
FILED
AUG 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-65

INGLEWOOD RESIDENTS' PROTECTIVE ASSOCIATION, *et al.*,

Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

BURT PINES,
City Attorney,

MILTON N. SHERMAN,
Chief Assistant City Attorney,

RONALD J. EINBODEN,
Deputy City Attorney,

#1 World Way,
Los Angeles, Calif. 90009,
(213) 646-3260,

Attorneys for Respondent,
City of Los Angeles.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-65

INGLEWOOD RESIDENTS' PROTECTIVE ASSOCIATION, *et al.*,

Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Respondent City of Los Angeles prays that the Writ of Certiorari sought by Petitioner not be issued and that the decision and opinion of the Court of Appeal (Second Appellate District) of the State of California remain undisturbed.

JURISDICTION.

A. Petitioner Has Made No Showing That the Instant Case Comes Within the Purview of 28 USC 1257(3).

1. The Validity of a Treaty, United States Statute or State Statute Has Never, at Any Time, Been Drawn Into Question.

Petitioner has not questioned the validity of a treaty or statute of the United States. Petitioner has failed to identify or allege any state statute which may be ". . . repugnant to the Constitution, treaties or laws of the United States. . . ."

Class actions in California are governed by the provisions of Code Civ. Proc., §382[1] and (as to consumer class actions since 1970) Civ. Code, §1781.[2]

Although Petitioner's only grievance is that the instant action cannot be maintained as a class action under California law, the applicable California statutory law has not been drawn into question. Rather, Petitioner claims that the mere denial of class treatment is a denial of due process and equal protection of the law. Therefore, it would appear that Petitioner's only basis for invoking the jurisdiction of this Court, under 28 USC 1257(3), is that such denial infringes upon a ". . . title, right, privilege or immunity . . . claimed under the Constitution, treaties or statutes of . . . the United

[1]Code Civ. Proc., §382 provides as follows:

"If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

[2]Civ. Code, §1781 provides in pertinent part, as follows:

"(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

"(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

"(1) It is impracticable to bring all members of the class before the court.

"(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

"(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

"(4) The representative plaintiffs will fairly and adequately protect the interests of the class."

States." Thus, Petitioner seeks to raise a Federal question sufficient to hurdle the jurisdictional issue. As will be shown, Petitioner fails to clear this first hurdle.

2. The Only Question Before the California Courts Was the Non-Federal Question of Whether This Action May Proceed as a Class Action.

Petitioner has consistently failed to differentiate between the bases for its various causes of action and the procedural remedy by which it may pursue such actions. While the various causes of action alleged by Petitioner may be founded in part upon Federal law, no decision on the merits of such claims has yet been rendered by a California court in the instant case. As will be shown herein, there was in fact no Federal question presented to or decided by the California court.

Consistently over the years it has been stated by this Honorable Court that it has no power to review local law as applied by local courts. Thus, in *Enterprise Irrig. District v. Farmers Mut. Canal Co.*, 243 U.S. 157, 165, 37 S.Ct. 318, 61 L.Ed. 644, 649 (1917) it was stated:

> "The claim that the court, in disposing of some of the questions, including that of estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. (Citations omitted.)"

That it is not the function of the United States Supreme Court to decide local questions has been pointed out in the following cases, among many others: *First Nat. Bank v. Anderson*, 269 U.S. 341, 346, 46 S.Ct. 135, 70 L.Ed. 295, 302 (1926); *American Railway Exp. Co. v. Kentucky*, 273 U.S. 269, 272, 47 S.Ct. 353, 71 L.Ed. 639, 641 (1927); *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 139, 58 S.Ct. 483, 82 L. Ed. 702, 714 (1938).

Not only must a Federal question be properly presented to the state court, but it must appear that the state court's decision of the Federal question was *necessary* to the determination of the case. *Honeyman v. Hanan*, 300 U.S. 14, 18, 57 S.Ct. 350, 81 L.Ed. 476, 479 (1937).

Respondent submits that the California court did not have to decide a Federal question necessary to the determination of this case for the following reasons:

1. The only question presented to the California court was whether or not the instant action may proceed as a class action. Code Civ. Proc., §382, relating to joinder of parties and class suits, is based on the equitable doctrine of virtual representation which rests on considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice. *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 703, 704; *Chance v. Superior Court* (1962) 58 Cal.2d 275, 291; *Weaver v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833, 837. The decision in the instant case was limited to a matter of procedure under California law.

2. A state may choose the procedure it deems appropriate for the vindication of Federal rights. *Young*

v. Ragen, 337 U.S. 235, 238, 69 S.Ct. 1073, 93 L. Ed. 1333, 1336 (1949). Due regard for the rightful independence of state government requires that procedural matters not foreclosing or affecting Federal rights be maintained. These general principles have long been recognized by this Court as indicated in the following quotation from *Central Vermont R. Co. v. White*, 238 U.S. 507, 511, 35 S.Ct. 865, 59 L.Ed. 1433, 1436 (1915):

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought."

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 185, 94 S.Ct. 2140, 40 L.Ed. 2d 732, 753 (1974) Justice Douglas, in a separate opinion, clearly identifies class actions as "legal remedies." The class action is an "invention of equity" (*Montgomery Ward & Co. v. Langer*, [8th Cir. 1948] 168 F.2d 182, 187) and is governed in the Federal Courts by rules (*i.e.*, Federal Rules Civ. Proc., 23) and in state courts by statutes and rules (*e.g.*, Code Civ. Proc., §382, Civ. Code, §1781). In California, the State Supreme Court has suggested that Federal Rules Civ. Proc., 23 may be utilized by trial courts in resolving the procedural problems facing a court in the trial of a class action. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821. The Federal Courts have held that Rule 23 is a rule of procedure. *Pioche Mines Consolidated, Inc. v. Dolman* (9th Cir. 1964) 333 F.2d 257, 265, cert. denied 380 U.S. 956, 85 S.Ct. 1081, 13 L.Ed. 2d 972; *Harris v. Palm Springs Alpine*

Estates, Inc. (9th Cir. 1964) 329 F.2d 909, 912-913. Similarly, a state determination of the allowability of a class action in specific instances is merely the invocation of a local rule of procedure. This is especially true in California where the Supreme Court of California has not only encouraged innovative procedural devices to expedite the handling of class actions, but has specifically referred the trial courts to Federal Rules Civ. Proc., 23 as a basis for establishing and resolving such procedural problems. *Vasquez v. Superior Court, supra,* 4 Cal.3d at 821.

That state class actions have their genesis in equity and not the Constitution or Federal law is clear from the following statement in 7 Wright & Miller, *Federal Practice and Procedure* (1972), Civil §1751, p. 507:

> "The equity class action practice was incorporated into the *procedural* codes of numerous states and was made applicable to actions at law as a result of the law—equity fusion that typically occurred at the time these codes were adopted." (Emphasis added.)

It was not necessary to reach any Federal question to determine the viability of a class action in this instance, nor was any Federal question in fact decided. Further, other more appropriate means of redress by the class, as individuals, has not been foreclosed by the California court's decision in this case. Appropriate constitutional guaranties have not in any way been thwarted—they merely have not yet reached a point of final adjudication. In such a case this Honorable Court lacks revisory

power over state practice. *Milk Wagon Drivers U. v. Meadowmoor Dairies,* 312 U.S. 287, 297, 61 S.Ct. 552, 85 L.Ed. 836, 843 (1941).

STATEMENT OF THE CASE.

While generally correct, Petitioner's Statement of the Case omits certain significant facts. For this reason, Respondent presents the following in order for this Court to have a complete factual statement.

The instant lawsuit seeks damages for injury to property and person allegedly incurred from jet aircraft operations at Respondent's Los Angeles International Airport. The complaint prays for an amount of $15,000.00 per property and person. In addition to the class, the complaint contains individually named plaintiffs (not affected by the class action ruling) numbering in the hundreds. Within the City of Inglewood (the geographical area generally encompassed within the complaint) are approximately 90,000 persons. Ostensibly, this number of persons comprised the "class." The real properties within the "class" area are as generally diverse as one might expect in a city the size of Inglewood. Such diversity includes size, use, zoning, improvements, age and location. Little need be said concerning the individual physical and emotional differences among some 90,000 persons. Against this factual background, the Court of Appeal of the State of California decided that a class action was inappropriate. The California Supreme Court subsequently denied a hearing.

REASONS FOR REFUSING THE WRIT.

A. Introduction.

Respondent has heretofore demonstrated that Petitioner has failed to show circumstances permitting it to invoke jurisdiction under 28 USC 1257(3).

The following points, keyed to Petitioner's Reasons for Granting the Writ, discuss the reasons for refusing the writ.

B. The Denial of Class Action Treatment in the Instant Case Is Neither a Denial of Constitutional and Civil Rights nor a Denial of Due Process and Equal Protection of the Law.

Petitioner's reason number 1 (Petition, p. 8) presents a somewhat rambling and garbled argument containing misstatements of fact and law. By inference, Petitioner seems to claim that the denial of class action treatment somehow denies the individual members of the "class" access to the courts to seek redress from certain alleged wrongs. Both from a practical and legal standpoint, nothing could be further from the truth.

Experience has shown that literally hundreds of named plaintiffs have instituted lawsuits claiming damages from Respondent because of jet aircraft operations at Los Angeles International Airport.[3] And, the vast

[3]*See, e.g., Los Angeles Unified School Dist. v. City of Los Angeles,* Los Angeles Superior Ct. Case No. 965,067; *Archdiocese of Los Angeles Education and Welfare Corp. v. City of Los Angeles,* Los Angeles Superior Ct. Case No. 998,331; *Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471; *Greater Westchester Homeowners Ass'n v. City of Los Angeles,* 11 Av. Cas. 18374 (Cal. Super. Ct. 1970); *Albert, et al. v. City of Los Angeles,* Los Angeles Superior Ct. Case No. C20144; *Derr v. City of Los Angeles,* Los Angeles Superior Ct. Case No. 944,461: *Irwin, et al. v. City of Los Angeles,* Los Angeles Superior Ct. Case No. 985,929; *Munger, et al. v. City of Los Angeles,* Los Angeles Superior Court Case No. 931,315; *Parker, et al. v. City of Los Angeles* (1974) 43 Cal.App.3d 976.

majority of those individually named plaintiffs has obtained recovery. The practicalities of bringing this type of lawsuit certainly have not deterred numerous other individuals from successfully pursuing their legal remedies in the courts of California. In the case of *Aaron, et al. v. City of Los Angeles* (1974) 40 Cal.App.3d 471, a case involving approximately 750 parceis of real property where damages were awarded to 520 property owners in the total amount of $650,000.00, this Respondent sought a Petition for Writ of Certiorari which was denied by the United States Supreme Court (419 U.S. 1122). This Court is therefore well aware that such actions are being and have been successfully pursued in California without resort to class action treatment.

The prayers involved in the instant case do not represent minuscule individual claims for damages, but run into the thousands of dollars per person. The plaintiffs are not small claimants who, but for the procedural device of the class action, would be denied access to the courts. The concerns expressed by Justice Douglas in *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156, 186 concerning small claimants who would go begging for justice without the class action are not present in the instant case.

Adequate state safeguards of Constitutional rights are available to individual plaintiffs in the instant case. These include, *inter alia:*

1. California Constitution, Article I, Section 19 (formerly Article I, Section 14), which provides in pertinent part:

   "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owners."

2. Code Civ. Proc. §382 and Civ. Code §1781 which authorize class actions in certain specified instances.

3. Decisions of the California Supreme Court which elaborate on the guidelines for maintaining class actions under specific factual circumstances. As the California Supreme Court stated in *Vasquez v. Superior Court, supra,* 4 Cal.3d 800, 821:

   "If the class action is to prove a useful tool to the litigants and the court, pragmatic procedural devices will be required to simplify the potentially complex litigation while at the same time protecting the rights of all of the parties."

Fairness to the litigants and expediency in serving the judicial process has been the hallmark of the development of class action law in California. This concern for the rights of the parties insures that Constitutional rights of every individual remain inviolate.

Petitioner's reference on page 12 of its Petition to the cases of "*Burbank v. Lockheed,* 411 U.S. 624; *Air Transport Assn. v. Crotti,* 389 F.Supp. 58, (1975); *American Airlines v. Hempstead,* 272 F.Supp. 266, 398 F2 369 (sic); *Airline Pilots Assn. v. D.O.T.,* 11 Avi 18,251" is confusing and misleading. None of these cases involves a class action. Little more need be said.

Just as the Federal Courts have recognized that whether a class action may be maintained is discretionary with the trial court (see, *e.g., Bermudez v. United States Department of Agriculture* [D.C. Cir. 1973] 490 F.2d 718, 724, cert. den. 414 U.S. 1104, 94 S.Ct. 737, 38 L.Ed. 2d 559; *Carter v. Butz* [3rd Cir. 1973] 479 F.2d 1084, 1089, cert. den. 414 U.S. 1103, 94 S.Ct. 737, 38 L.Ed. 2d 559), so must it be held that the maintenance of class actions in state courts is a matter of state discretion and concern.

C. It Is Not Necessary to Review Griggs v. Allegheny in Connection With Class Action Litigation.

After convoluted argument, Petitioner boldly pronounces that "The limited right of redress articulated by the *Griggs* case no longer satisfies recognized societal needs." (Petition, p. 15.) *Griggs v. Allegheny County,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 2d 585 (1962) basically held that it was the owner and operator of the airport (as opposed to the airlines or the United States) which was required to compensate the plaintiffs in that case (369 U.S. 84, 89-90).

Griggs does not stand for the proposition (apparently advanced by Petitioner) that inverse condemnation is the sole legal theory upon which a plaintiff allegedly aggrieved by airport operations may sue. Nor does California law purport to limit such plaintiffs to inverse condemnation. In *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, an airport case involving over

700 plaintiffs suing the City of Santa Monica, the California Supreme Court specifically recognized the existence of a nuisance cause of action and very clearly did not foreclose the proper pleading of negligence, zoning violations and theories of dangerous and defective conditions of public property. One is left to wonder what point Petitioner is trying to make.

While not crucial to the issues herein, Respondent finds it necessary to correct Petitioner's misstatement that ". . . the California Appellate Court notes that in 1967 the airlines agreed to fund $300,000,000 in bonds for further expansion of LAX and the necessity for acquisition of 'airspace or air easements or similar interest in land.'" (Petition, p. 14.) The airlines at no time agreed to "fund" these bonds. The true fact, as stated in *City of Los Angeles v. Japan Air Lines Co., Ltd.* (1974) 41 Cal.App.3d 416, 423 is that ". . . each of the airlines executed an amendment to its basic lease whereby it agreed to pay the City such additional landing fees as might from time to time be necessary to service up to $300,000,000 of any bonded indebtedness so incurred by the City." The airlines did not "fund" such bonded indebtedness. Further, the City of Los Angeles has not yet incurred a bonded indebtedness in the total anticipated amount of $300,000,000 through the issuance of Airport Revenue Bonds.

D. There Is No Denial of "Just Compensation" Merely Because a Class Action May Not Be Maintained.

In an argument bordering on the frivolous, Petitioner somehow claims that just compensation is denied by the holding that a class action may not be maintained. How and why this occurs is not demonstrated by Petitioner. California Constitution, Article I, Section 19 guarantees the payment of just compensation when there is a taking or damaging of private property for public use. The California courts have established that just compensation must be paid where there is a taking or damaging of private property by a municipal airport operator. In *Aaron v. City of Los Angeles, supra,* 40 Cal.App.3d 471, 493 it is stated:

> "In summary we hold that the municipal operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in the market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking."

The *Aaron* case, as does the case of *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 recognizes that land is unique. *Aaron* directs what must be shown in order to establish a claim for just compensation. *San Jose* holds that a case such as the instant one is inappropriate for class action treatment. Neither case forecloses the payment of just compensation when required by the California Constitution or the United States Constitution. Other than the recitation of numerous cases not on point, Petitioner makes no showing of any denial or potential denial of just compensation.

E. The Jurisdictional "Power" of the City of Los Angeles Is Properly Not an Issue Which Has Been Decided Herein, nor Is It Relevant to a Determination of the Class.

Respondent will attempt to respond to this issue raised by Petitioner, but Respondent candidly admits its confusion in attempting to unravel the mysteries of this circuitous argument. Preliminarily, Respondent understands the law to be that the question of the power or right to acquire property as well as the amount of compensation to be paid does not ordinarily involve a Federal right. *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U.S. 239, 252, 25 S.Ct. 251, 49 L.Ed. 462, 468 (1905); *Stone v. Southern Illinois & M. Bridge Co.*, 206 U.S. 267, 273, 27 S.Ct. 615, 51 L.Ed. 1057, 1060 (1907). In *Madisonville*, it was stated:

> "Speaking generally, it is for the state, primarily and exclusively, to declare for what public purposes private property within its limits may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken." (196 U.S. at 252.)

Other than certain unsupported conclusions coupled with a reference to some dark "dilemma" (Petition, p. 19), Petitioner fails to connect its arguments coherently with the issue of a class action. Clearly, the *Madisonville* and *Stone* cases, considered in light of the aforementioned California cases (*i.e., Aaron, San Jose, Nestle, Vasquez*, etc.) foreclose the necessity of further discussion of this issue. The question of Respondent's authority or "power" is one to be decided by the California court, if and when the issue is properly presented.

CONCLUSION.

For the reasons stated herein, Respondent respectfully urges that the writ prayed for by Petitioner be denied.

Respectfully submitted,

BURT PINES,
City Attorney,

MILTON N. SHERMAN,
Chief Assistant City Attorney,

RONALD J. EINBODEN,
Deputy City Attorney,

Attorneys for Respondent,
City of Los Angeles.